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APR 11 2011
JEANNE HICKS, Clerk
By: Rita Storms

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: V1300CR201080049

Date: April 11, 2011

TITLE:	COUNSEL:
STATE OF ARIZONA	Sheila Sullivan Polk Yavapai County Attorney Bill Hughes, Esq. Steven Sisneros, Esq. Deputy Yavapai County Attorneys
(Plaintiff)	(For Plaintiff)
vs.	
JAMES ARTHUR RAY	Thomas K. Kelly, Esq. 425 E. Gurley Prescott, AZ 86301 Luis Li, Esq. Brad Brian, Esq. Truc Do, Attorney at Law Miriam Seifter, Attorney at Law MUNGER TOLLES & OLSON LLP 355 S. Grand Avenue, 35th Fl. Los Angeles, CA 90071
(Defendant)	(For Defendant)

RULING RE PARTIES' MEMORANDA CONCERNING ADMISSIBILITY OF EVIDENCE RELATING TO LESSER-INCLUDED OFFENSE/STATE'S DE FACTO MOTION FOR RECONSIDERATION

The Court has considered the memoranda submitted by the parties. Although the Court did not order a response, both response and reply memoranda were submitted.

The parties have not provided specific legal authority for their positions. The Court therefore confirms its conclusion that the issue should be determined by application of Rule 403 and the basic principles of relevance.

As this Court explained in open court, it would not be appropriate for the State to introduce evidence relevant only to an offense that is ***potentially a necessarily included offense***. As noted by the Defendant in response to the State's bench memorandum and motion for reconsideration, a necessarily included offense must be distinguished from a lesser-included offense, which by law is included in the greater offense only for charging and

notice purposes under Rule 13.2(c) of the Arizona Rules of Criminal Procedure. Whether a lesser-included offense instruction and verdict form are ultimately given to the jury depends on the evidence produced at trial. Thus, to admit evidence which may or may not be relevant to a charge submitted to a jury would be to admit what might ultimately be completely irrelevant and therefore highly prejudicial evidence.

Also, admitting evidence relevant only to a lesser-included offense, even if the evidence already admitted at trial had indicated a likelihood that the lesser-included instruction would be given, would allow admission of evidence carrying a high degree of danger of unfair prejudice relating to the greater offense. In order to illustrate the principle at stake, the following hypothetical is provided: The State has charged a second degree murder case based on an alleged intentional shooting. At trial it developed that the evidence of an intentional shooting ultimately was very weak but did withstand a motion under Rule 20. Throughout the trial the Court had allowed 404(b) (other act) evidence and expert testimony that was relevant, at most, only to a charge of negligent homicide or, according to the defense, only civil negligence. The jury would then be in a position to consider extensive evidence that was completely irrelevant to the greater offenses of manslaughter and second degree murder. There would be an obvious concern that the jury could be confused, despite skilled closing argument, about the multiple charges and limited relevance of much of the evidence. It would not be appropriate to conduct a trial in that fashion, hoping that a limiting instruction given at the end of the trial would be effective.

The specific evidence under consideration here is of the two types mentioned in the hypothetical – other acts and expert testimony. Admitting prior acts that are irrelevant to manslaughter charges is particularly problematic. The jury would have to be instructed that a lesser-included offense instruction is anticipated and that the other act evidence, which often presents a danger of unfair prejudice, could only be considered as to that anticipated lesser offense. Likewise, expert testimony that is irrelevant to manslaughter charges, while perhaps carrying less danger of unfair prejudice, would again necessitate the awkward procedure of instructing the jury as to the anticipated lesser-included offense. Without the anticipatory instruction, the jury would be hearing evidence relating to charges that have not been described to them. Furthermore, as mentioned in the Court's separate ruling relating to Steven Pace, Mr. Pace does not appear to be qualified to provide expert testimony concerning the nature of the risk, i.e. the substantial risk of death, that would be relevant to either manslaughter or negligent homicide.

For the reasons set forth above,

IT IS ORDERED **denying** the motion for reconsideration.

DATED this 11th day of April, 2011.

Warren R. Darrow
Superior Court Judge

cc: Victim Services Division